Testimony of LESTER BRICKMAN before the
Subcommittee on Telecommunications, Trade and Consumer Protection
of the Commerce Committee of the House of Representatives
Hearings on Liability Reform
April 30, 1997

I want to thank the Subcommittee and its chairman, Congressman W.J. Billy Tauzin for extending me an invitation to testify on the subject of liability reform. The issue is one of great significance and merits close attention.

Our civil justice system and its three main branches: torts, contracts and fiduciary law, defines the duties that we owe to each member of society. This morning the Subcommittee has asked me to focus on the tort system -- a body of law and practices which is described in an ABA report "as a mirror of morals and a legal vehicle for helping to define them." Looking in that mirror, what I see -- what I think most of us see, is a quite disturbing picture. So let me come right to the point.

Something is very wrong with the tort system. It is infected with perverse incentives which raise transactional costs to intolerable levels--as much as 60% of each benefit dollar paid out, and inflates medical care costs by billions of dollars. In addition, it is growing by leaps and bounds even as we produce safer automobiles and safer consumer products and as accident rates, occupational injuries and work-related deaths decline. Evidence mounts daily that tort claims are increasingly disengaged from injury.

Consider, by way of example, what is going on in automobile accident litigation. Cars and

roads are safer, air bags and anti-lock brakes are increasingly widespread, more people are using seat belts, driving speeds have declined and, as you would expect, accident rates have declined. For these same reasons, we would also expect an even greater decline in the number of bodily injury claims as a percentage of total auto accident claims. Yet, exactly the opposite is occurring. In a recent period, for every 100 property damage claims, there were 13 bodily injury claims in Harrisburg, Pennsylvania, 16 in Pittsburgh and a stunning 75 in Philadelphia. But wait, in Los Angeles, there were 99 bodily injury claims per 100 accidents.

Everyone understands what is happening. It's the "hit me I need the money" game. People are suing more but what is driving this litigiousness? The most plausible answer--indeed, the compelling answer, is the contingency fee.

Lawyer's Rates of Return Under the Contingency Fee System

The contingency fee has been called the key to the courthouse for the injured plaintiff--and indeed that is undeniable. But it is also the key to enormous and untold riches. It yields plaintiffs' lawyers well in excess of 18 billion dollars annually--wealth which is redistributed throughout the political and judicial process to purchase protection from public scrutiny.

Over the past 25 years, there has been a radical change in the degree of "contingency" built into the contingency fee system. Today there is little that is "contingent" about the contingency fee. Lawyers prevail--that is obtain more than nominal sums--in 70-90 percent of all claims represented--most often through settlements. In the past twenty five years, the likelihood

of a personal injury plaintiff's prevailing at trial has doubled. At the same time, the average judgment, adjusted for inflation, has risen five-fold. Though there has thus been a dramatic decrease in the risk of nonrecovery and a huge increase in the average judgment, the standard contingency fee has not only not declined, it has risen substantially! The standard contingency fee today yields five to eight times as much income, in inflation-adjusted dollars, than it did twenty-five years ago. It is interesting to note that this enormous increase in contingent fee income parallels the enormous contemporaneous expansion of the scope of liability imposed under the tort system.

The contingency fee engine is running at full throttle because lawyers have created a lucrative system which enables them to get effective rates of thousands of dollars an hour. In my writings, I document instances of effective rates of $10,000 even $25,000 an hour in contingency fee cases where there is no issue of liability.[1] Given these financial incentives, it is no wonder then that the amounts of wealth transferred under the aegis of the tort system have increased faster than for that of virtually all other social transfer systems including social security, Medicare and workers compensation. We as consumers pay the costs of the tort system in the form of higher product prices. The tort tax is every bit as real as the sales tax and aggregates about 150 billion dollars a year; as a percent of GNP, it averages 2.2 times the tort costs of most European countries.

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[1] *See* Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement,* 53 Wash. & LEE L. REV. 1339, 1345 n. 22 (1996) [hereinafter Brickman, *The Case Against Case-by-Case Enforcement*].

Even as $1000, $5000 and $10,000 an hour rates are being eclipsed by $25,000 and even $50,000 an hour rates, yielding fees in some cases in the tens and hundreds of millions of dollars, there are those supporters of the status quo who argue that reforms are not necessary because we really don't enough about contingency fee lawyers' fees to speak authoritatively. It is not surprising that this argument is made. Consider what the F-117A fighter-bomber and contingency fees have in common. Neither appear on radar screens. By design, we know less about the hourly rates effectively being charged by the top third of the contingency fee bar than we do about the earnings of professional athletes; that is no accident. Contingency fee lawyers routinely obtaining these fees generally do not participate in bar-sponsored surveys of lawyers' incomes. They know better. Stealth sheathing obscures the connection between their enormous hourly rates, the effect such fees are having on the tort system and the increasing irrelevance of injury rates to recoveries.

A Critique of My Hourly Rate Thesis And My Response

I have pierced that sheathing. In November 1995, I testified before the Senate Judiciary Committee that contingency fees yield inordinately high rates of return which are far in excess of both ethically mandated commensurate fee risk borne by lawyers and competitive market rates.[2] That proposition has been challenged by Professor Herbert Kritzer.[3] Kritzer's position is that

[2] *Contingent Fee Abuses: Hearings Before the Senate Judiciary Committee,* 104th Cong., 1st. Sess. (1995) (statement of Lester Brickman).

[3] *See* HERBERT M. KRITZER, RHETORIC AND REALITY… USES AND ABUSES… CONTINGENCIES AND CERTAINTIES: THE POLITICAL ECONOMY OF THE AMERICAN CONTINGENT FEE (Inst. for Legal Studies Working Paper No. 11-8, 1995) [hereinafter: KRITZER, RHETORIC AND REALITY]; *Contingent Fee Abuses: Hearings Before the Senate Judiciary Comm.*, 104th

contingency fees generate hourly rates of return that are substantially similar to hourly-based fees.[4] He asserts that disproving the propositions I have advanced regarding high rates of return obviates the need for consideration of solutions to contingency fee abuses.[5] Kritzer thus argues against the proposals I have advanced.

Kritzer's basic premise that reform is unneeded is untenable. Financial incentives which drive plaintiffs' lawyers and also make it profitable for defendants to often adopt intransigent settlement postures lead to intolerably high transaction costs and a dysfunctional – and sometimes extortionate -- tort system. Therefore, even if Kritzer's conclusion that the hourly rates earned by contingency-fee lawyers are comparable to defense attorney hourly rates were true, transaction costs still consume far too high a percentage of tort transfer payments.[6] Moreover, medical care

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Cong., 1st Sess. (1995) (statement of Herbert Kritzer) [hereinafter, Kritzer Statement].

[4] Kritzer Statement, *supra* note 3, at 1A ("On average, however, the contingent fee, and the hourly fee differ relatively little.").

[5] *Id*. ("[T]he data I have been able to locate fail to support the claims of the critics of current contingent fee practiceÿ. [T]hose considering major reforms need to obtain reliable, systematic information on theÿ contingent feeÿ before instituting significant changes.").

The problem of contingency fee abuses has generated numerous proposals for reform. *See, e.g.,* Lester Brickman, *The Case Against Case-By-Case Enforcement*, *supra* note 1; Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks,* 65 FORD. L. REV. 247 (1996) [hereinafter, Brickman, *Money Talks, Ethics Walk*]; LESTER BRICKMAN, MICHAEL HOROWITZ, JEFFREY O'CONNELL, RETHINKING CONTINGENCY FEES (1994) [hereinafter BRICKMAN ET AL, RETHINKING CONTINGENCY FEES].

[6] *See* DEBORAH N. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES (1991) (transactional costs account for almost half of settlement and damage awards); JAMES S. KAKALIK ET AL., VARIATIONS IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES xvii (in asbestos litigation, the fees and expenses average 61% of the total payments of defendants and injurers - plaintiffs receive only 39%).

costs are sharply escalated by the incentives for contingency lawyers to "build up" these costs in order to generate higher pain and suffering settlement values,[7] which in turn generate higher contingency fees. Thus, the RAND Corporation's Institute for Civil Justice has estimated that 35-42% of medical care costs generated by automobile accidents are fraudulent[8] – a product of contingency fee math. In addition, under the impetus of the contingency fee engine, consolidations and class actions -- or combinations of the two – are often used to coerce defendants to transfer millions and even billions of dollars in settlements in the absence of any clear indication of injury or responsibility on the part of defendants.[9] While these examples of a abuses mandate reforms in their own right -- quite apart from the issue of inordinately high rates of return, Kritzer's argument that hourly rates earned by contingency fee lawyers are not significantly distinguishable from hourly rates earned by defense lawyers is simply wrong.

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[7] *See* Jeffrey O'Connell, *Blending Reform of Tort Liability and Health Insurance: A Necessary Mix*, 79 CORNELL L. REV. 1303 (1994).

[8] STEPHEN CARROLL, ALLAN ABRAHAMSE, MARY VAIANA, RAND, THE COSTS OF EXCESS MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES 3 (1995).

[9] In decertifying a class action brought on behalf of hemophiliacs infected by the AIDS virus, Judge Richard Posner noted that even though the defendants had won twelve of the first thirteen verdicts, the defendants would be "under intense pressure to settle" if class certification were upheld because they "mightÿeasily be facing bankruptcy." Rhone-Poulenc Rorer, Inc. 51 F.3d 1293, 1298 (1995) (Posner, J.). *See also* In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F. 3d 768 (3d Cir.), *cert denied*, 116 S.Ct. 88 (1995) ("class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the threat of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth"); Castano v. American Tobacco Co., 84 F.3d 734, 746 n.22 (5th Cir. 1996). *See generally*, Lester Brickman, *Class Action Reform*: *Beyond Rhone-Poulenc Rorer*, Manhattan Inst. (Research Memo. No. 10) (1995).

Kritzer's conclusion that earnings of plaintiffs' lawyers are comparable to defense lawyers is based upon analysis of two published studies, surveys conducted by state bar associations, and unpublished annual income and effort data. I critiqued the published studies[10] as overbroad and unreliable in a previous article,[11] and I will not repeat my analysis here.

State Bar Association Surveys

Kritzer relies upon annual income data from state bar association surveys conducted in nine states,[12] and concludes from his "best estimate" that the effective hourly rate for plaintiff lawyers "is clearly in the same ball park as the hourly rates quoted by defense lawyersÿ."[13]

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[10] Stephen C. Dietz, Bruce Baird, and Lawrence Berul, *The Medical Malpractice Legal System*, *in* Appendix: Report of the Secretary's Commission on Medical Malpractice 87-167 (HEW 1973), *cited in* KRITZER, RHETORIC AND REALITY, *supra* note 1, at 18; Kritzer, Sarat, Trubek & Felstiner, Winners and Losers in Litigation: Does Anyone Come Out Ahead?, *in* Civil Litigation Research Project Final Report, Part C, at 29, 59 (Univ. of Wis. Inst. for Legal Stud., 1987), *cited in* KRITZER, RHETORIC AND REALITY, *supra* note 3, at 18. The former study looked only at medical malpractice cases, and indicated that the mean hourly rate earned by plaintiffs' lawyers was $61-$84, compared to $47 for defense lawyers. The latter study is from the Civil Litigation Research Project -- conducted in the period 1979-1981 -- which indicated that the median effective hourly rate for contingency-fee lawyers was $42. The median hourly rate reported by hourly rate lawyers was $50. *See* Kritzer et al., *Understanding the Costs Litigation: The Case of the Hourly Fee Lawyer*, ABA Bar Foundation Research Journal (1984), *cited in* KRITZER, RHETORIC AND REALITY, *supra* note 3, at 19.

[11] See Lester Brickman, *Contingent Fees Without Contingencies*: *Hamlet Without the Prince of Denmark*, 36 UCLA L. REV. 29, Appendix B (1989) [hereinafter, Brickman, *Contingent Fees*]. For Kritzer's response to my critique, *see* KRITZER, RHETORIC AND REALITY, *supra* note 3, at 41-43.

[12] The surveys were conducted in Colorado (1993), Florida (1984), Iowa (1990), Michigan (1994, 1991). Nebraska (1994), New Hampshire (1990), Ohio (1994, 1990), Texas (1992), and Wisconsin (1986, 1992). *See* KRITZER, RHETORIC AND REALITY, *supra* note 3, at 20.

[13] *See* KRITZER, RHETORIC AND REALITY, *supra* note 3, at 21. For Kritzer's estimates of median hourly rates of plaintiff and defense lawyers based upon the state economic surveys, *see*

However, the data do not support this conclusion; indeed there is more than ample evidence to indicate that the data is simply inapplicable to substantial numbers of contingency fee lawyers. Most plaintiffs' lawyers insist upon contingency fees to the total exclusion of hourly rates.[14] The survey data indicates, however, that a meaningful number of those surveyed who were categorized as contingency fee lawyers derived a significant percentage of income from non-contingency work. Indeed, Kritzer himself acknowledges that one problem with the surveys is that "there is no common definition of who is a personal injury specialist."[15] Survey respondents who indicated that their incomes came only partly from contingency fees almost certainly did not restrict their practices to tort claims, as do the majority of tort lawyers, and most especially, the most successful ones. Accordingly, the state bar association surveys relied on by Kritzer as a measure of plaintiff lawyers' earnings are badly flawed because they neither provide a modest approximation of contingency fee lawyers' earnings or hourly rates.[16]

Unpublished Annual Income and Effort Data

Kritzer – perhaps realizing that the survey data is flawed for this reason -- obtained raw unpublished data from economic surveys conducted in Wisconsin (1992), Ohio (1994), and

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id. at 21 tbl. 2.

[14] *See, e.g.,* DEREK BOK, THE COST OF TALENT 139 (1993).

[15] KRITZER, RHETORIC AND REALITY, *supra* note 3, at 20.

[16] The hourly rate calculations are further undermined because they are based upon estimates by Kritzer of the number of hours worked annually by those lawyers reporting their annual incomes. *See* KRITZER, RHETORIC AND REALITY, *supra* note 3, at 21.

Michigan(1994), and recalculated the hourly earnings, this time attempting to limit the data only to plaintiff lawyers whose practices "are exclusively or predominantly contingent fee."[17] Kritzer estimated that the median effectively hourly rates for Wisconsin, Ohio, and Michigan as $113, $88, and $81, respectively, and concluded that the results are "consistent with the thrust of my analysis."[18] However, this survey data is quite flawed by the very limited lawyer response to the surveys. The Wisconsin data is based upon only 39 respondents, while the Ohio and Michigan data are based upon only 34 and 41 respondents, respectively.[19] Moreover, Kritzer offers no explanation why hourly returns based upon Ohio and Michigan data are so much less than those based upon the data from Wisconsin. This finding is an anomaly in view of Wisconsin's more rural environment,[20] because contingency fee lawyers are usually located in more urban areas, where fees tend to be higher.[21]

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[17] *See* Kritzer Statement, *supra* note 3, at 12.

[18] *Id*. at 12, 13.

[19] *Id*. at 12. Kritzer concedes that his samples are "fairly small." *Id*.

[20] Data from the 1990 census indicates that rural areas in Michigan and Ohio were inhabited by 29.5 percent and 25.9 percent of their residents, respectively, whereas rural areas in Wisconsin were inhabited by 34.3 percent of its residents. *See* 1990 Census of Population and Housing, "Population and Housing Unit Counts," CPH-2-1, tbl. 1 (released Oct. 1995). The national average of the population living in rural areas is 24.8 percent. *Id*. The Census Bureau defines a rural area as open areas or places with fewer than 2,500 inhabitants. *Id*.

[21] Consider, for example, that the average payment received in auto accident claims by claimants in central cities was $11,638 in 1992, whereas as the average payments in rural areas was $7,108. INSURANCE RESEARCH COUNCIL, PAYING FOR AUTO INJURIES 50 (1994) [hereinafter IRC, PAYING FOR AUTO INJURIES].

Kritzer also conducted an "an unscientific study" in an attempt to obtain information on the amount of time spent on cases by plaintiff lawyers.[22] Kritzer estimated from data contained in 92 cases provided by "a small number of lawyers around Wisconsin" that the median effective hourly rate of plaintiff lawyers was $125, which he claims is "in the same range as those discussed previously."[23] Quite apart from what Kritzer terms the study's "unscientific" character, its findings are again seriously undermined by its small sample size.

It is highly likely that both the state bar surveys -- flawed to the point of uselessness due to the failure to limit the data to contingency fee practitioners -- and the unpublished annual income data – flawed by the paucity of respondents -- are further flawed by financially-motivated, self-selective behavior. Stated simply, higher-earning contingency fee lawyers do not respond to state bar association surveys. Contingency fee lawyers fully understand that public awareness of multi-thousand dollar an hour rates of return would lead to pressure for contingency fee reform.[24] Since higher-earning contingency-fee lawyers do not act against their own self-interest, they do not disclose their incomes.[25] Indeed, in some cases, contingency fee lawyers would rather forgo a fee

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[22] KRITZER, RHETORIC AND REALITY, *supra* note 3, at 25.

[23] *Id*.

[24] Consider the following response of one of the leading contingency-fee lawyers to a proposal for contingency-fee reform offered by a prominent group of scholars and practitioners: "It's none of their business how much client's pay me." Peter Passell, *Contingency-Fee Windfalls Under Attack*, NY TIMES, Feb. 11, 1994, at B18 (quoting Philip Corboy).

[25] *See* James W. Michaels, *Sidelines*, FORBES, Nov. 6, 1995, at 10 (Editor-in-chief of Forbes' discusses the magazine's efforts to publish an article about lawyer income and describes trial lawyers as "less than forthcoming" about the income they earned; also discussing how Forbes' reporters gathered information about the income of well-known lawyers by talking with

than disclose their actual fees, let alone their hourly return.[26] Since the surveys are essentially useless as a measure of contingency fee income, so too then are Kritzer's calculations of hourly returns – which are based upon survey data of total lawyer income.

Furthermore, Kritzer's considerable reliance on Wisconsin data for much of his conclusion is badly misplaced and an indication of Kritzer's lack of comprehension of the geographical dimensions of contingency fee abuses. Wisconsin data is simply not indicative of dominant trends in contingency-fee-driven tort litigation. For example, the frequency of lawyer representation in auto accident claims in Wisconsin is 34% compared to a national average of 41% and percentages ranging from 60-77% for the five highest jurisdictions;[27] for lawyer representation of bodily injury claims, the frequency is 42% compared to New Jersey with 92%, District of Columbia - 78%, and Maryland - 74%.[28] In Wisconsin, only 7% of bodily injury

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"ex-wives, clients, accountants, adversaries," and filing Freedom of Information Act requests and examining court settlements.).

[26]Asbestos Corp., Ltd., No. 81 C 3220, 1991 WL 195800 (N.D. Ill. Sept. 23, 1991).

[27] *See* IRC, Paying For Auto Injuries *supra* note 21, at Appendix 1, tbl. 4-4. Automobile accident data is particularly instructive in this context since the majority of tort claims filed in state courts are automobile claims. *See* Steven K. Smith, Carol J. Defrances, Patrick A. Langan, and John Goerdt, *Tort Cases in Large Counties*, Bureau of Justice Statistics (1992), *in Three Out of Four Tort Cases Settled Out of Court*, D.O.J News Release, April 13, 1995, at 3 (a study of 378,314 tort cases disposed of by state courts in a one-year period ending in 1992 in the nation's 75 most populous counties indicates that auto torts accounted for 60.1 percent of the tort cases).

[28] INSURANCE RESEARCH COUNCIL, AUTO INJURIES: CLAIMING BEHAVIOR AND ITS IMPACT ON INSURANCE COSTS 49, fig. 5-10 (1994).

claimants file lawsuits compared to 29% in California and 28% in Pennsylvania.[29] Over a recent ten-year period, bodily injury claim loss increased 96% in Wisconsin compared to a national average of 146% and such high end increases as 357% in Massachusetts and 325% in Delaware.[30] In view of these statistics, one would no more seek out Wisconsin data for trends in the tort system as one would for trends in illegal immigration or air pollution or women's fashion. The focus of tort litigation in the United States is in states such as Texas, Alabama, Florida, California, the District of Columbia, Hawaii, and parts of New Jersey, Massachusetts, Pennsylvania, New York, Delaware, and elsewhere; these are states which have litigiousness measures that are multiples of those for Wisconsin.

Quite apart from the flawed data, Kritzer fundamentally misperceives the ethical underpinnings for charging contingency fees and the fiduciary duties that apply to lawyers. For example, Kritzer acknowledges that some contingency fees are very high on an hourly basis, citing as an example the reputed $420 million fee earned by Joe Jamail from the Pennzoil v. Texaco case.[31] This choice illustrates Kritzer's failure to grasp the nature of the ethical argument I have

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[29] *Id*. at 53, fig. 5-13. For this category, Wisconsin ranked 15th lowest of 23 jurisdictions studied. *Id*.

[30] *See* ALL-INDUSTRY RESEARCH ADVISORY COUNCIL, COMPENSATION FOR AUTOMOBILE INJURIES IN THE UNITED STATES 55-56, tbl. 5-2 (1989) (data on bodily injury loss costs for the period 1977-1987).

[31] Pennzoil, Co. v. Texaco, Inc., No. 84-05905, (Texas Dist. Ct. 1985) (awarding Pennzoil $7.51 billion in compensatory damages and $3 billion punitive damages for Texaco's tortious interference of a merger agreement between Pennzoil and Getty), *cited in* KRITZER, RHETORIC AND REALITY, *supra* note 3, at 1 n.1.

advanced, namely that the contingency fee percentage charged must be commensurate with the risk of nonpayment. The Pennzoil litigation involved a high degree of risk. Indeed, quite apart from the nuances of the properly condemned practice of lawyer contributions to the campaign funds of judges who are sitting on cases represented by the lawyer contributors,[32] few lawyers expected Pennzoil to prevail and even fewer foresaw even the remote possibility of so enormous an award of damages.[33] Accordingly, the Jamail fee, even if it was well in excess of $420 million, and generated hourly earnings of tens of thousands of dollars, was fully justified by the substantial risk he faced when he took the case. Accordingly, the Jamail fee is not the type of fee that is the focus of my attention.

A better example of a failure to justify a substantial risk premium is the 1989 Alton, Texas case in which a $122 million partial settlement, entered into after a school bus accident in which

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[32] In 1984 Joe Jamail, Pennzoil's lead attorney, contributed $10,000 to state District Judge Anthony Farris' campaign at about the same time the Texaco case was assigned to Farris' court. *See* David Warsh, *Judicial Politics in Houston*, BOSTON GLOBE, Mar. 27, 1987, at 65. The $10,000 contribution was the largest given Farris in 1984. *Id*. A study indicates that between January, 1990 and June, 1994, sitting State Supreme Court Judges in Texas and plaintiff's lawyer-backed candidates for the state courts received in excess of $4 million from plaintiff's lawyers. *See* American Tort Reform Association, *The Plaintiff's Bar: America's Third Political Party* (1994); *See also, Attorneys Gave Millions to Politicians, Study Says*, FT. WORTH STAR-TELEGRAM, Sept. 14, 1994, at 24 (describing the study). For criticism of this practice, *see* Darrell Keith, *Texas' Faulty Judicial Selection System: A Call for Reform*, FORT WORTH STAR-TELEGRAM, July 24, 1994, at 5; *Sixty Minutes: Justice For Sale* (CBS television broadcast, 1987).

[33] *See, e.g.*, J. Michael Kennedy, *Texaco Fined $10.5B in Pennzoil Lawsuit*, L.A. TIMES, Nov. 20, 1985, at A1 (a Texaco lawyer reacting to the verdict stated "I think you could say we were surprised, shocked, and astounded.").

there was no issue as to liability, yielded attorney fees of more than $40 million.[34] Seventeen of the twenty-one cases involving the death of a child were settled for $4.5 million each; the reported 40 percent contingency fee yielded attorney fees of at least $1.8 million per client.[35] Since most of the attorneys did not participate in the settlement negotiations, and only limited preparatory work was undertaken because the likelihood of a trial was remote, a liberal estimate of the time expended by most of the attorneys would be fifty to seventy-five hours.[36] Accordingly, a conservative estimate of the hourly rate of attorney compensation would be $25,000-$30,000.[37] The attorney fees received were ethically improper, but not because of the high rates of return themselves. They were improper because the contingency fee percentage charged grossly exceeded the risks being borne by the lawyers.[38]

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[34] *See* BRICKMAN ET AL, RETHINKING CONTINGENCY FEES, *supra* note 3, at 55 n.24.

[35] *Id*. (citation omitted).

[36] *Id*.

[37] *Id*.

[38] Kritzer reveals a further lack of comprehension of contingency fee practice in his criticism of my calculation of the effective hourly rates of plaintiff lawyers in asbestos litigation, which I estimated as being just short of $5,000. *See* Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1834-35 n.61 (1992) [hereinafter, Brickman, *The Asbestos Litigation Crisis*]; KRITZER, RHETORIC AND REALITY, *supra* note 3, at 12 n.15. Kritzer criticizes the estimates I used of case times in hours for processing Manville Trust Fund claims. He says the figures I used "seem extremely low from what I have seen of the time required for the preliminary stages of routine litigation." *Id*. However, the Manville Trust Fund claims that I was analyzing were not litigations; rather, as I indicated, they were simply administrative processings of claims. Lawyers simply came with thousands of claims and settled them *en masse*.

Kritzer also asserts that I accept "at face value the hourly rates quoted by hourly fee lawyers," but this is patently false. KRITZER AND REALITY, *supra* note 3, at 42. For example, the hourly rate figure of $175 that I calculated for defense lawyers working on the Manville Trust Fund was not based upon hourly rates quoted by defense attorneys, but rather it was extracted

In addition to disputing the effective hourly rates that I have testified to and misperceiving the ethical underpinnings of contingency fees, Kritzer also vastly overestimates the risks borne by contingency fee lawyers – presumably as a precautionary justification of the substantially higher hourly rates they obtain – should that indeed be the case. His declarative statement that contingency fee lawyers "face substantial risk"[39] however, is belied by their highly effective use of screening techniques to lower risk.[40] The effectiveness of contingency fee lawyers' case screening procedures is carefully examined in a series of federal tax cases determining the deductibility of expenses and costs of litigation advanced by contingency lawyers to clients under fee agreements in which the client bears litigation costs.[41]

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from billing statements submitted by dozens of firms submitted to one asbestos defendant over an eighteen-month period. Some of the monthly statements exceeded one hundred computer-generated pages.

[39] KRITZER, RHETORIC AND REALITY, *supra* note 3, at 37.

[40] Although Kritzer acknowledges that "the logic of the contingent feeÿsuggests that contingent fee lawyers would reject a large number of cases that potential clients bring to them," he concludes that there is insufficient information on the nature of case screening practices. *See* KRITZER, RHETORIC AND REALITY, *supra* note 3, at 13-14.

[41] There are three types of fee contracts in general use by contingency fee lawyers; they vary on the basis of who bears litigation expenses such as expert witness fees, transcription costs, filing fees, etc.

(1) The client pays the expenses in full out of the recovery; the lawyer's contingency fee applies to the net recovery. If the recovery were $100,000 and the fee 33% and expenses $10,000, then the fee would be $30,000 ($100,000 - $10,000 = $90,000; 30% of 90,000 = $30,000). The client would net $60,000 ($100,000 - $10,000 - $30,000) less any lost wages and medical expense. This fee structure once prevailed, but no longer. Lawyers have effectively raised their contingency fee rates--even those who charge the same percentages--by applying the contingency fee to the gross fee, as in the second type of agreement below.

(2) The client pays the expenses in full out of the recovery; the lawyer's contingency fee applies to the gross recovery. Using the same numbers as in (1) above, the fee would be $33,333 (33% of $100,000). The client would net $56,667 ($100,000 - $10,000 - $33,333) less any lost wages and medical expenses

In Burnett v. Commissioner of Internal Revenue,[42] a contingency fee lawyer sought to deduct advances made to clients for living expenses which were to be repaid only if the lawyer was successful in recovering on the clients' claim.[43] To determine whether the expenditures were deductible business expenses or nondeductible loans, the Fifth Circuit rejected the taxpayer's contention that contingency of recovery, in and of itself, qualified the expenditures to be deducted as business expenses, and proceeded to examine the circumstances and conditions under which the payments were made. The record revealed that the lawyer exercised "a high degree of selectivity" by carefully evaluating the strength of a client's claim before making payments to them and that he limited the amount of each payment to under the expected recovery.[44] Moreover, the

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(3) A third type of contingency fee agreement--one motivated solely by tax considerations--has the attorney bearing all litigation costs and reimbursing himself out of his own share of any recovery. Using the same numbers as above, the lawyer's gross contingency fee would be $33,333 (one third of $100,000) and his net fee would be $23,333 ($33,333 less $10,000). The client's share of the recovery would be $66,667 less any lost wages and medical expenses. If the attorney bearing litigation costs charged a higher contingency fee percentage, e.g., 40 percent, then the calculations are as follows: The fee would be $40,000 (40% of $100,000) and the net fee would be $30,000 ($40,000 - $10,000). The client's share would be $60,000 ($100,000 less $40,000) less any lost wages and medical expenses. Because of tax considerations, including the ability of the lawyer to deduct the $10,000 of costs paid in the year of incurrence, discussed *infra* note 42, the $30,000 net fee arrangement may provide after-tax income greater than the $33,333 fee.

[42] 356 F.2d 755 (5th Cir.), *cert. denied*, 385 U.S. 832 (1966).

[43] A lawyer typically is prohibited from advancing such financial assistance to clients in connection with litigation. *See* MODEL RULES OF PROFESSIONAL CONDUCT, RULE 1.8(e); MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-103(B).

[44] Burnett at 757. Thus, the court noted that "although reimbursement was tied to the recovery of a claim, assistance was granted only to those whose claims would in all probability be successfully concluded." *Id.* at 760. Although the client is generally obligated to repay the advances, no reimbursement occurs if the client is impecunious. Indeed, many firms make no effort to seek reimbursement of expenses if there is no recovery.

record revealed that the lawyer recovered over 98 percent of these expenditures.[45] The court concluded that the lawyer's expenditures to his clients "were virtually certain to be repaid," and thus held them to be nondeductible loans rather than deductible business expenses.

The modest degree of overall contingency being borne by tort lawyers is further diminished by the extension of the screening process to post-case selection. That is, firms reassess their claim portfolio constantly as further information becomes available, and devote more time to and advance more funds on stronger cases than on weaker ones -- a process of investment that continues throughout the life of the claim process. Indeed, empirical data confirms that this occurs.

Thus, in a recent Ninth Circuit case involving the tax deductibility of litigation expenses,[46] the Court indicated that the firm advanced substantially more litigation expenses in the 70 percent

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[45] *Id*. at 758. The Tax Court found that $4,417 out of approximately $290,000 advanced by the taxpayer-lawyer had become worthless. *Id*. at 760. The rate of recovery is $290,000 minus $4,417 = $285,584; $285,583 over $290,000 = 98.5 percent.

[46] Boccardo v. Commissioner of Internal Revenue, 56 F.3d 1016 (9th Cir. 1995). In Burnett v. Commissioner of Internal Revenue., 356 F.2d 755 (5th Cir.), *cert. denied*, 385 U.S. 832 (1966), litigation costs incurred under net fee contracts were held to be nondeductible; in response, the firm revised its fee structure by offering clients the third type of fee agreement set forth in note 41, *supra*. Under this latter fee contract, which the Ninth Circuit in 1995 called a "gross fee contract," the lawyer pays the litigation costs -- not the client -- and the contingency fee percentage is applied to the gross recovery. In the Ninth Circuit case, the Court held that litigation costs incurred under gross fee contracts, unlike the other fee contracts, are deductible in the year they are paid since there is no contractual right to reimbursement ("the firm is no more reimbursed its expenses than a self-employed commissioned salesman is reimbursed the travel costs incurred in making a sale when the commission check for the sale finally arrives."). Boccardo v. Commissioner of Internal Revenue Service, at 1018.

of cases that it won than in the 30 percent of cases that it lost.[47] In fact, the ratio of expense advance investment in winning cases to losing cases was $3.86:$1.[48] It is reasonable to assume that lawyer investment of time and effort per case was commensurate with outlays for litigation expenses, that is, that the lawyers devoted more time as well as increased expense outlay to the cases they believed that would win and indeed did win than to the cases it lost -- thus demonstrating that the screening process continues after initial case selection.

Ethical Rules That Apply to Contingency Fees

Kritzer's assertions to the contrary notwithstanding, contingency fees have become so lucrative that contingency fee lawyers routinely and uniformly refuse to even consider any form of hourly rate fee. While lawyers are ethically bound to offer clients a choice of fee structure, these ethical requirements are simply ignored. Lawyers are also ethically bound to advise potential clients of the risk that their claims present so that these lay people can have some basis of assessing the price that the lawyer proposes to charge.[49] For example, if a driver injured by being

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[47] In the 70 percent winning cases, the firm obtained reimbursement for 90 percent of the litigation expenses incurred from all of its cases -- winners and losers -- under gross fee contracts, that is, the amount of the outlays in the winning cases was ninety percent of the total outlays. Boccardo v. Commissioner of Internal Revenue Service, at 1017. Thus, the firm advanced more funds on the winning cases on a per case basis than on the losing cases.

[48] Assume the firm had selected ten cases, incurred a total of $1000 in litigation expenses, and won 70 percent of the cases (seven) and lost 30 percent (three). A total of $900 would then have been invested in the seven winning cases, and $100 invested in the three losing cases. The per winner case average investment would be $900 divided by seven ($128.85), and for losing cases, it would be $100 divided by three ($33.33). $128.85 is 3.86 times greater than $33.33.

[49] *See* Brickman, *Contingent Fees*, *supra* note 11, at 49-70 for an elaboration of this thesis.

"rear-ended" when stopped at a traffic light seeks a lawyer's assistance in presenting a claim, the lawyer is obligated to disclose to the claimant that there is no issue of liability. Moreover, depending upon the severity of the injury and the amount of insurance coverage, the lawyer must also disclose--if true--that the claim can be resolved by simply documenting the facts and injuries, a task that is likely to require only a few hours of the attorney's time. These ethical and fiduciary precepts are rarely if over observed. As recently noted by former Harvard president and law school dean Derek Bok:

> The lure of obtaining a fraction of . . . handsome sums has caused most trial lawyers to insist on contingent fee arrangements, even if their clients can afford to pay the normal hourly rate. . . . There is little bargaining over the terms of the contingent fee. Most plaintiffs do not know whether they have a strong case, and rare is the lawyer who will inform them (and agree to a lower percentage of the take) when they happen to have an extremely high probability of winning. In most instances, therefore, the contingent fee is a standard rate that seldom varies with the size of a likely settlement or the odds of prevailing in court.[50]

The reason for the failure of lawyers to make such disclosure as noted by President Bok, is of course, that disclosure conflicts with a lawyer's self-interest. To be sure, ethics rules are supposed to assure that such self-interested behavior is at least restrained. They don't. Lawyers not only ignore this ethical requirement, they do so with fervor. Lawyers are also ethically bound to charge contingency fees commensurate with the risks they are assuming. Keep in mind that

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[50] Derek Bok, THE COST OF TALENT 139, 140 (1993).

lawyers routinely screen out the majority -- even two thirds or more -- of claimants because of high risk or insufficient return, and charge standard fees even in cases with no meaningful risk. Here too, ethical considerations are simply ignored. Indeed, lawyers acknowledge openly and often proudly that they relish the opportunity to make "easy money" by charging standard contingency fees in cases with "clear liability and high return."[51] However, charging fees of 33% to 40% in cases without risk and with high reward is both illegal and unethical. . . and routine. If an injured person comes to a lawyer and it is overwhelmingly likely that a substantial settlement will be forthcoming simply by making a few phone calls or writing a few letters, lawyers routinely mislead their clients as to the quantum of risk. Charging a standard contingency fee ranging between one third and forty per cent of the gross recovery in such a circumstance, that is, charging a substantial premium for assuming risk in the absence of any meaningful risk, is really no different that an hourly rate lawyer billing for 20 hours when she has only worked 10 hours. In both instances, the fee is fraudulent.

Not only do contingency fee lawyers fail to disclose the most meaningful price information in their advertising, that is, their effective hourly rates, they also compound the omission by charging standard contingency fee rates. Since all lawyers charge such rates, this serves to communicate the view that lawyers undertake substantial risk in all cases. How could it be otherwise given the very substantial risk premiums that lawyers charge? Yet, this is patently false. The use of standard contingency fees is intended to and does communicate a false risk assessment.

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[51] Andrew Blum, *Big Bucks, But. . .*, NAT'L L.J., Apr. 2, 1989, at 47.

The Total Absence of Enforcement of Ethics Rules

Enforcement of ethics rules is in the hands of state and local bar disciplinary boards. As a rule, however, these disciplinary agencies steer clear of fee issues. This failure of enforcement reflects the view of most lawyers that the contingency fee system is a money machine that benefits all lawyers. Indeed, in a recent ethics advisory opinion, Formal Opinion 94-389 (1994), the American Bar Association Standing Committee on Ethics and Professional Responsibility held that charging standard contingency fees in the absence of meaningful risk and where the lawyers could anticipate a substantial settlement was not *per se* unethical. While parroting the bar's mantra that contingency fees must be "reasonable," the ABA Committee went on to reject all effective mechanisms for assuring the reasonableness of contingency fees. To the ABA, contingency fee clients are sheep to be shorn. In an article criticizing that opinion,[52] I said that when ethical requirements and contingency fees intersect, the outcome is painfully clear: "Money talks, Ethics walks."

Both plaintiff lawyers and the ABA are allied in their contention that violations by contingency fee lawyers of their ethical duties are best dealt with not by reforms but by lawyer discipline on a case-by-case basis. However, in an article I have just published,[53] I described an empirical survey that I undertook which indicates that over the course of more than a half century

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[52] I append a copy of that article to this written statement to be included as part of my testimony. Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks,* 65 FORD. L. REV. 247 (1996).

[53] I append a copy of that article to this written statement to be included as part of my testimony. Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 WASH. & LEE L. REV. 1339 (1996).

of disciplinary enforcement of ethics codes and at least 100,000,000 contingency fee tort representations, there have been at most 3 lawyers disciplined for charging standard contingency fees in tort cases when ethically mandated commensurate risk was absent. A lawyer is more likely to win a state lottery. . . twice, than to be disciplined for such ethics violations.

The Need for the Congress to Intervene

The assertion by opponents of contingency fee reform that there is case-by-case enforcement of the ethics codes' admonition against unreasonable and clearly excessive fees in the contingency fee context is itself a pretextual practice utilized in support of the status quo. Case-by-case enforcement simply does not exist -- even for the most flagrant violations. If there is to be any enforcement of ethical admonitions with regard to contingency fees, it will have to come from outside of the disciplinary process. But from where? The rejection by the ABA Standing Committee on Ethics and Professional Responsibility, in Formal Opinion 94-389, of the request to permit contingency fee clients even the barest modicum of consumer protection would indicate that the self-regulatory process itself has failed in this area.

The success of the assault on ethical standards is instructive. If contingency fee clients are to receive any protection, it will not be from the ABA, the judiciary or the disciplinary process. *Sed quis custodiet ipsos custodes.* (But who then is to guard the guards?)

When Plato was confronted with the question of "who is to guard the guards

themselves?", he termed that "an absurd idea -- a guardian to need a guardian!"[54] Plato of course never met the American Bar Association or its counterpart on the plaintiff side, the American Trial Lawyers Association. If basic protections are to be afforded to tort victims, it will either come from the Congress. . . . or it will not come at all.

The Contingency Fee System Also Defrauds Society

The enormity of the fraud being perpetuated by many contingency fee lawyers against injured parties is matched only by the fraud that the contingency fee system perpetrates on society. The vehicle by which this societal fraud is furthered is the category called pain and suffering--a judicial invention to provide a means of compensation for contingency fee lawyers. It is a standard rule of thumb that in tort litigation, every dollar of medical expenses incurred creates $3 in pain and suffering value. It does not take a rocket scientist to quickly comprehend the baleful effects of this perverse financial incentive. Billions and billions of dollars in unnecessary medical expenses are being added to the nation's health care bill by the contingency fee system. As I have previously stated, the Rand Corporation has determined that 35-42% of all medical expenses incurred by auto accident victims are fraudulent -- a product of contingency fee math.[55] Consider two identical automobile accidents--each resulting in identical injury. One claimant retains a lawyer and the other deals directly with the insurance carrier. The one going to a lawyer will run up as much as 250% more medical bills than the unrepresented claimant but will net about the same as the unrepresented claimant. More than 25 billion dollars of excess insurance

[54] PLATO, THE REPUBLIC, Book 3, 403-E, *quoted in* John Bartlett, FAMILIAR QUOTATIONS 122 n. 8 (Emily Morison Beck, ed., 15th ed. 1980).

[55] *Supra* note 8.

premiums are being extracted annually from the American people under this fraudulent system.

Other Effects of An Overincentivized Contingency Fee System

The harm being done to the nation by an out-of-control contingency fee system is not exhausted by simply recounting the endemic fraud that contingency fees induce. There are other consequential effects of a contingency fee system often yielding effective hourly rates in the thousands of dollars. Contingency fee lawyers are bounty hunters who collect rewards for both pursuing and capturing tortious behavior and by gaining compensation for those injured by that behavior. In theory, society benefits from the deterrence effects of such a bounty system. When bounty hunters see the opportunity to earn more bounties (in the form of pain and suffering awards and punitive damages) by working harder--all well and fine. But when bounties become so enormous that they enable bounty hunters to amass commensurate power in the judicial and political processes, a different phenomenon evolves. The bounty hunter is no longer content to do the equivalent of simply catching the fleeing felon by redressing the tortious injury. Instead, the bounty hunter gains control over the process of declaring what circumstances permit payment of bounties; what is to be declared tortious behavior becomes an outcome of the size of the bounty that will be collected if such behavior is declared tortious. If medical science says that a claimed injury is not caused by a certain product--indeed, if medical science says that the claimed injury is not even an injury--but the bounty or contingency fee is high enough--in the millions, even billions of dollars, then the result is increasingly predictable: it is the contingency fee system that determines the outcome--not medical science. I need only point out breast implant litigation as an example of how enormous contingency fee incentives easily triumph over the findings of medical

science. Another example which the Subcommittee is already well aware of is the deleterious impact of the contingency fee system on the availability of life saving biomaterials.

Reforms Must Focus on the Perverse Financial Incentives

The only lesson that any careful observer of the tort system can reasonably draw is that we need systemic reform--reform that benefits consumers by shifting dollars from transactional costs--largely lawyer fees--to victims and to lowered insurance costs. Reform--to be effective--must focus with laser beam intensity on the perverse financial incentives that now motivate both plaintiff lawyers and defendants and their lawyers to engage in self interested behavior that adds intolerably to the costs of our tort system and renders it increasingly dysfunctional.

What we need are speed brakes to slow the contingency fee engine to a more moderate pace. Let me suggest a few approaches that differ from and supplement such reforms as are provided for in S.5. I propose consumer protection laws to give consumers added rights including protection from fee gauging and choices with regard to the purchase of auto insurance.

The "Early Offer" Proposal

First, to reduce windfall fees that drive the expansion of tort liability, and which contribute mightily to the current feeding frenzy, we need to create a financial incentive to put *all* lawyers on a diet. What is needed is a simple and self-executing system to restrict contingency fees to sums in dispute; one that gives defendants an opportunity to make early settlement offers before any meaningful time or value adding efforts have been made and that enforces ethical prohibitions

against lawyers charging risk-based fees on case values already substantially established before representation has commenced. Such a plan would enable plaintiffs to receive larger percentages of the value of their claims at the expense of *both* plaintiff and defendant lawyers. Senate Bill 1861, introduced into the 104th Congress by Senator Dole on his last day of office and joined in by Senator McConnell, does exactly that. It is based upon a proposal drafted by Jeffrey O'Connell of the Virginia Law School, Michael Horowitz, formerly of the Manhattan Institute and now at the Hudson Institute and myself.

I want to emphasize that the early offer proposal is not a fee regulation bill. Rather it has two central objectives: (1) to enforce ethical rules that lawyers in every state have made a part of their codes of ethics but now ignore, regarding the reasonableness of fees; and (2) to create conditions for the operation of free market principles in an area of practice now characterized by complete absence of price competition. The early offer proposal would give the little guy the same bargaining power as large corporations when they negotiate legal fees. It creates the same market bargain that would be reached if tort clients had such bargaining power. Accident victims today have no ability to negotiate fees with contingency fee lawyers because they lack critical information. The early offer proposal requires that lawyers provide their clients with information about the value of their claims at the very outset of the representation, before the lawyer has done any significant value-adding work. The information would be provided by the defendant in the form of an early offer of settlement in cases where the defendant believed that liability was clear or would be established. It is a self-effectuating, self-enforcing plan that would promote early settlement of tort claims, reduce lawyer fees -- both plaintiff and defense fees -- in cases of clear

liability, increase the net compensation to accident victims, significantly reduce medical cost build up that is a central feature of the current contingency fee system, and reduce insurance premiums and product costs.

The "Auto Choice" Proposal

The second reform we need is to eliminate the attorney stranglehold on auto insurance. The current auto tort system is regressive. Under it, lower income persons get smaller awards when they are injured because of their lesser earning capacities, thus effectively forcing them to subsidize wealthier drivers. All drivers, however, who buy insurance are required to handsomely subsidize lawyers. It is time to unbundle the insurance package and allow consumers to choose whether to buy pain and suffering coverage as is done in Senate bill, S.625 recently introduced into the 105th Congress by Senators Mitch McConnell, Rod Grams, Slate Gordon, Joseph Lieberman and Daniel Moynihan. This bipartisan effort is the basis for Governor Christine Whitman's recent proposal to the New Jersey legislature and has received the editorial endorsement of the New York Times.

The proposal, which mandates that automobile drivers be given a choice of whether to purchase pain and suffering coverage, would substantially eliminate most auto accident litigation. Over a seven year period, its enactment would save American motorists and consumers as much $300 billion dollars. Even Everett Dirksen would have regarded that as real money.

The "Fees As Matter of Public Information" Proposal

The tort system is "owned" by the public. How it operates is of great public concern. Lawyers involved in the tort system greatly impact the nation's economy and values. When activity sufficiently impacts the public interest, we typically mandate financial disclosure so that the public may decide for itself whether there is a relationship between amounts and sources of income and the carrying out of essential public tasks. There are other contexts in which disclosure is required. For example, we require expert witnesses in trials to disclose the fees they are obtaining out of concern for the impact of fees on testimony and because of the relevance of that information to juries. Also, we require disclosure of the fees of lawyers and other professionals rendering opinions that are included in initial public offerings of securities for similar reasons--because the size of the fee itself may be indicative of significant underlying problems.

The fees and effective hourly rates of return of contingency fee lawyers greatly impact the tort system. Indeed, there is considerable evidence that the driving force behind the enormous 30 year expansion of the scope of liability imposed under the tort system is the contingency fee engine. Surely that expansion is a matter for public concern as are the fees that drive that expansion. It is therefore ironic that we know more about the earnings of sports figures than we do about contingency fee lawyers despite the effects of those earnings on the tort system.

The hourly rate fees of defense lawyers do not present the same public policy concerns. Moreover, tort defendants, typically businesses and insurance companies, have the capability and do in fact bargain with their lawyers and exercise strict controls over fees. (This is one reason why defense firms often seek out plaintiff work--because they obtain far higher hourly rates when

they represent plaintiffs and charge contingency fees than when they represent defendants and charge hourly rates.) In a study[56] I published a few years ago, I concluded that in asbestos litigation involving the Manville Trust entity, plaintiff lawyers were receiving $5,000 per hour for claims that were administrative in nature while the average defense costs to asbestos defendants at that time was under $175 per hour. In New York, one of the highest cost jurisdictions, insurance companies typically pay $140 an hour to partnership level defense lawyers. (The rates can be higher in major litigations.) For many contingency fee lawyers, this amounts to pocket change.

If the Congress were to mandate full disclosure of effective and actual hourly rate fees in tort litigation, both plaintiff and defense lawyers would strongly object. But the public interest would be well served. Accordingly, I urge the Congress to require that lawyers' fees in tort cases, in the form of effective hourly rates of return, should be made a matter of public record. The public has a right to know this most critical information about how the tort system is operating. It is time to let the sunshine in.

Conclusion

It is important that this Subcommittee make the American people aware of the enormous fees being obtained by contingency fee lawyers -- often in risk-free cases -- fees of millions of dollars, even tens of millions of dollars and sometimes reaching into the hundreds of millions of dollars. On an hourly basis, these fees amount to thousands of dollars an hour, even $25,000 an hour and higher -- often in cases without any meaningful risk.

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[56] *See* Brickman, *The Asbestos Litigation Crisis, supra* note 38.

Though these contingency fee abuses constitute clear violations of lawyers' ethical rules, they are not being addressed by courts or by lawyer disciplinary boards and least of all by the principal trade associations representing lawyers' interests: the American Bar Association and the American Trial Lawyers Association.

If these abuses are to be addressed, it will be up to the Congress to do so. The time is at hand for the Congress to provide consumers the basic protections that I have outlined in my testimony.